

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAM MUGRABY,

Case No.: 1:19-cv-00153-VM

Plaintiff,

-against-

**OFFER OF JUDGMENT PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 68**

REFLECTIONS YOGA, LLC,

Defendant.

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TO PLAINTIFF SAM MUGRABY AND HIS ATTORNEYS OF RECORD RATH, YOUNG & PIGNATELLI, P.C.:

PLEASE TAKE NOTICE THAT, Defendant REFLECTIONS YOGA, LLC, (“Defendant”) hereby offers to allow entry of judgment to be taken against it pursuant to Rule 68 of the Federal Rules of Civil Procedure as follows: a judgment in favor of plaintiff SAM MUGRABY (“Plaintiff”) and against Defendant, in the total sum of **\$750.00** (seven hundred fifty dollars and zero cents) inclusive of costs accrued in favor of the Plaintiff. This shall be the total amount to be paid by Defendant on account of any and all liability claimed in this action, including all costs of suit and attorneys fees otherwise recoverable in this action by Plaintiff.

If Plaintiff does not accept this offer, he may become obligated to pay Defendant's costs incurred after the making of this offer in the event that he does not recover a judgment that is more favorable than this offer of judgment pursuant to Rule 68(d) of the Federal Rules of Civil Procedure.

To accept this offer, Plaintiff must serve written notice of acceptance thereof within fourteen (14) days of the date this offer is made.

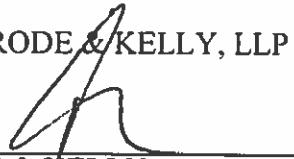
This offer is not to be construed in any way as an admission of liability by the Defendant, but rather is made solely for the purpose of compromising a disputed claim.

Dated: Mineola, New York
April 8, 2019

Respectfully submitted,

KELLY, RODE & KELLY, LLP

BY:


EDWARD J. KELLY
Attorneys for Defendant
330 Old Country Road - Suite 305
Mineola, New York 11501
(516) 739-0400
Our File No.: HMW/EJK 150770-400
E-Mail: ekelly@krklaw.com

TO: RATH, YOUNG and PIGNATELLI, P.C.
Attorneys for Plaintiff
120 Water Street - 2nd Floor
Boston, Massachusetts 02109
(603) 226-2600

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 10th day of April, 2019, I served a true copy of the within Offer of Judgment Pursuant to Federal Rule of Civil Procedure 68 by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known addresses set forth after the name:



EDWARD J. KELLY
E-Mail: ekelly@krklaw.com

John D. Kelly (1921-2000)
John Kenneth Rode (retired 2003)

Shawn P. Kelly
George J. Wilson
Loris Teppioni
Kevin E. Way
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Brian M. Dunphy
Hilary M. Wissmann

Antonia Bortone
Lindsey T. Brown
Barbara A. Dalton
Bassam H. Dola
Evan B. Feuerstein
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John S. Meade IV
Jeffrey A. Mondella
Ashley M. Pappas
Christopher J. Pedraita
Michele A. Perlin
Alexander F. Ponze
Jennifer Prusiecki
Merle Schrager
Steve K. F. Scott
Eric P. Tosca
Jessica A. Woodrow
Firm Administrator
Thomas G. Schumm

April 8, 2019

PRIVILEGED & CONFIDENTIAL
FRE 408 SETTLEMENT COMMUNICATION

RATH, YOUNG & PIGNATELLI, P.C.
120 Water Street - 2nd Floor
Boston, Massachusetts 02109

Attention: Robert Parker, Esq.

RE: MUGRABY v. REFLECTIONS YOGA, LLC
Our File No.: HMW/EJK 150770-400

Dear Mr Parker:

We are in receipt of and refer to your recent "Demand Letter" seeking \$20,000 to settle a disputed copyright infringement claim alleging that your client's photograph was infringed by "REFLECTIONS YOGA LLC" at an unspecified date and time.

This letter has been sent pursuant to Federal Rule 408 and is intended to provide a response to your "Demand Letter."

Please be advised that the entity you sued is a defunct corporation which was wound down in 2016 and never operated from the address you incorrectly alleged was its principal place of business.

RATH, YOUNG & PIGNATELLI, P.C.
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Nevertheless, we are aware that our client Reflections Studios Inc., which operates from 227 E. 24th Street New York NY 10010, did come into possession of a copy of the image allegedly owned and registered by your client through an independent third party not employed or otherwise affiliated with the company. Our client did not willfully infringe any copyright allegedly attached to the image. The sole use of the image was a one-time use in connection with a charitable fundraiser event ("One in Love Time for Togetherness") that occurred on December 16, 2016, attended by four persons and generating a total of \$200.00 in donations to a veterans' cause. The fundraising event generated no direct or indirect revenue or profit for Reflections Studios Inc.

In this context, we contend that our client's "fair use" of your client's alleged copyrighted work does not constitute infringement (17 U.S.C. § 107), and certainly there was no willful infringement.

Our research discloses that your client offers a license fee of \$50.00 to copy/use the image (<https://boxist.com/stock-photo/love-heart-by-hands-against-vivid-sky-31679.html>). We contend therefore that any actual damages for a one time inadvertent infringement should be measured by the actual license fee -- \$50.00.

We also are aware that before we were retained, an attorney named Michael Lesser contacted you on our client's behalf and entered into settlement negotiations wherein it was discussed that your client's claim could potentially be settled for a sum less than \$1000.00. We understand from our research that the settlement range discussed with Mr. Lesser is more or less consistent with settlements your client has obtained from other alleged infringers in similar claims. We understand that settlement discussions with Mr. Lesser were unfortunately suspended when you learned that our client potentially had insurance coverage applicable to this claim. Please be advised that our client's general liability carrier, State Farm, has disclaimed coverage for this claim and will not indemnify our client for any settlement or award.

We contend that in this context, it is extremely unlikely that this litigation will result in a finding of willful infringement against our client, but even assuming arguendo that such a finding is possible, we expect that the Court would only award the minimum allowed statutory damages pursuant to 17 U.S.C. § 504, to wit - \$750.00.

The recent decision in *Fameflynet, Inc. v. The Shoshana Collections, LLC*, (S.D.N.Y. 2018) is instructive and supports our analysis.

Accordingly, in response to your Demand Letter, pursuant to FRCP 68, we hereby proffer an Offer of Judgment in the total amount of \$750.00, inclusive of all fees and costs, as full and final settlement of this litigation. Please see the attached Offer of Judgment to that effect.

RATH, YOUNG & PIGNATELLI, P.C.
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We look forward to your written response within the next fourteen days. We are hopeful that the case may be resolved prior to the Initial Conference scheduled before Judge Marrero on April 26, 2019 at 11:45 AM.

In the interim please do not hesitate to contact me if there are any concerns or questions. Thank you for your courtesy and cooperation. Kind regards.

Very truly yours,

KELLY, RODE & KELLY, LLP

BY: 

EDWARD J. KELLY

EJK/jb